No. 83-1614

In the Supreme Court of the United States

OCTOBER TERM, 1983

SUE GOTTFRIED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The questions affecting the federal respondents are as follows:

1. Whether the Federal Communications Commission, the Department of Education, or the Attorney General is legally obligated to promulgate regulations specifying the requirements of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, in the field of television programming.

2. Whether the Federal Communications Commission is required by the Communications Act of 1934, 47 U.S.C. 301 *et seq.*, or by the First or Fifth Amendments to promulgate regulations specifying the measures that broadcasters must take to make their programming understandable to the hearing impaired.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 719 F.2d 1017. The district court's judgment (Pet. App. 16-18) and its findings of fact and conclusions of law (Pet. App. 19-40) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1983, and a petition for rehearing was denied on January 3, 1984 (Pet. App. 46). The petition for a writ of certiorari was filed on March 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This is one of several closely related proceedings initiated in different forums by petitioners and others regarding the captioning of television programs for the

hearing impaired. This Court is already familiar with one of these cases — the litigation that began with an attempt by petitioner Sue Gottfried and another party[1] to block the license renewal applications of major commercial and noncommercial television stations in Los Angeles. The Federal Communications Commission rejected the request for denial of license renewal. The court of appeals affirmed with respect to the commercial stations (*Gottfried* v. *FCC*, 655 F.2d 297, 312-316 (D.C. Cir. 1981), and this Court denied certiorari (454 U.S. 1144 (1982)). The court of appeals, in the same opinion, vacated the FCC's order with respect to the noncommercial station, KCET, holding (655 F.2d at 306-312) that the Commission was required to make an independent assessment of whether the station's programming complied with Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. 794, which prohibits discrimination against the handicapped in federally assisted programs or activities. This Court reversed. *Community Television of Southern California* v. *Gottfried*, Nos. 81-298 & 81-799 (Feb. 22, 1983). The Court held that the agencies that provide financial assistance to broadcasters have the obligation to enforce Section 504 and that the Commission, which does not provide such funding, had acted properly in adopting a policy of considering a station's programming under the public interest standard of the Communications Act of 1934 (Communications Act), 47 U.S.C. (& Supp. V) 307(a) and (d), 308(a), 309(a) and (d), while also taking into account any Section 504 violations found by the funding agencies. (For convenience, we will refer to this litigation as "*Gottfried I.*")

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[1]The other party was the Greater Los Angeles Council on Deafness, Inc. (GLAD), which was a plaintiff in this case. GLAD was dismissed by the district court for lack of standing and did not appeal (see Pet. App. 2 n.3).

2. In the present case, petitioners brought a class action in the United States District Court for the Central District of California, claiming that public television stations that receive federal financial assistance are required by Section 504, as well as by provisions of Title III of the Communications Act of 1934, 47 U.S.C. (& Supp. V) 301 *et seq.*, and various constitutional provisions, to provide "open captioning" for their programs. (Open captions are visible to all viewers; "closed captions" are visible only on television sets equipped with special decoding devices).[2] Petitioners accused the Corporation for Public Broadcasting (CPB),[3] the Public Broadcasting Service (PBS),[4] and Community Television of Southern California (the licensee of KCET) of acting unlawfully by producing, distributing, and broadcasting programs without open captions. Petitioners alleged that the Federal Communications Commission, the Department of the Health, Education, and Welfare and its successor the Department of Education, and the Attorney General had improperly failed to promulgate regulations specifying broadcasters' obligations with respect to captioning. And petitioners claimed that HEW, the Department of Education, and the FCC had distributed federal financial assistance to stations and other broadcasting entities that had not met their captioning obligations.

After petitioners put on their case, the district court dismissed the complaint against CPB, PBS, and KCET, holding that petitioners had failed to prove that those

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[2]The decoders cost approximately $250 (Pet. App. 2 n.2).

[3]The Corporation for Public Broadcasting is a government-chartered corporation that receives federal funds and, among other things, makes grants to public broadcasting stations and funds the production of programs. See 47 U.S.C. (& Supp. V) 396-399b.

[4]The Public Broadcasting Service is a non-profit corporation governed by member public stations that schedules, promotes, and distributes noncommercial television programs.

defendants had discriminated against the hearing impaired (see Pet. App. 5, 19-20, 38-40). After trial, however, the court held that "closed captioning is not a reasonable alternative for deaf people to have access to television" (Pet. App. 36), "thus implying that only open captioning would comply with the Rehabilitation Act" (*id.* at 6). The court held that the federal agencies' failure to promulgate regulations specifying captioning requirements resulted in discrimination against the hearing impaired (Pet. App. 33) and violated not only Section 504 of the Rehabilitation Act, but also the Due Process and Equal Protection Clauses and the First Amendment (Pet. App. 34-36). The court therefore enjoined the federal defendants from expending any funds for public television programming, with the exception of funds related to open captioning (*id.* at 16-18).

3. The court of appeals reversed the judgment against the federal defendants and affirmed the dismissal of the complaint against CPB, PBS, and KCET (Pet. App. 1-12). First, relying on *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), the court of appeals held that the district court had erred in ordering the termination of funding since "nothing in the structure of the Rehabilitation Act * * * authorizes court-mandated termination of funds upon the request of a private plaintiff"[5] (Pet. App. 7).

The court then held that the federal agencies were not required to promulgate regulations. Requiring the Attorney General to promulgate regulations was error, the court held (Pet. App. 8), because his "responsibility entails the review of proposed regulations, but not their promulgation."[6] Citing this Court's decision in *Gottfried I*, the court

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[5]Petitioners have not sought review of this holding.

[6]By Exec. Order No. 12,250, 45 Fed. Reg. 72995 (1980), the responsibility for coordinating implementation of Section 504 was transferred from the Secretary of HEW to the Attorney General. However, the executive order did not require the Justice Department itself to issue regulations or otherwise interpret Section 504.

concluded that the FCC was not compelled to issue regulations under Section 504 because the FCC does not provide financial assistance to public stations (Pet. App. 8). And relying on the well established rule that federal agencies generally have discretion to proceed by rulemaking or adjudication in interpreting their governing statutes (see, *e.g., NLRB* v. *Bell Aero Space Co.*, 416 U.S. 267, 294 (1974)), the court held that the Department of Education had not abused its discretion in employing adjudication, rather than rulemaking, to specify Section 504's requirements in the area at issue.

Turning to the dismissal of the complaint against CPB, PBS, and KCET, the court noted that the Department of Education requires stations receiving its assistance to broadcast programs containing closed captions in such a way that the captions can be received on a properly equipped set[7] (Pet. App. 11). Under *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), the court concluded, public stations are not required to take further affirmative action (Pet. App. 10-11).

Finally, the court of appeals noted (Pet. App 12) that petitioners' constitutional claims were "not well articulated" and found "no support in any existing legal precedent."

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, petitioners seek, in large measure, to relitigate matters already conclusively decided against them. Accordingly, further review of this case is not warranted.

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[7]The Department of Education also requires that all programs produced with its funds be closed captioned.

1. Petitioners first contend (Pet. App. 12-15) that the Department of Education, the Attorney General, and the Federal Communications Commission are legally obligated to promulgate regulations defining the requirements of Section 504 in the field of noncommercial television programing. This contention lacks merit for at least two reasons.

a. First, two of these respondents — the FCC and the Attorney General — are not responsible for enforcing the Rehabilitation Act and thus can hardly be required to issue interpretive regulations. In *Gottfried I*, this Court held (slip op. 11-12) that the responsibility for enforcing the Rehabilitation Act had been entrusted to those agencies that provide federal financial assistance. Petitioners have made no effort to show that the Attorney General provides such assistance. They attempt at considerable length to show that the FCC furnishes such aid, but their arguments are invalid, and in any event this issue has previously been decided against them.

In *Gottfried I*, the court of appeals rejected the claim that the FCC provided financial assistance to broadcasters by granting them licenses (655 F.2d at 312-314). Sue Gottfried (one of the petitioners here) and the Greater Los Angeles Council on Deafness, Inc. (a plaintiff below)[8] filed a petition for a writ of certiorari (No. 81-651) claiming that a broadcast license constitutes federal financial assistance under Section 504 (Pet. App. 5-10) and that the FCC also provides such assistance to broadcasters when it processes various applications without charging fees (Pet. App. 11-12). In our brief in opposition, we showed that these arguments are inconsistent with the statutory language, legislative history, and administrative interpretations of the

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[8]See note 1, *supra*.

Rehabilitation Act and the statutes on which it was modeled. This Court denied the petition (454 U.S. 1144 (1982)).

Petitioners' argument was again rejected when this Court held in *Gottfried I* (slip op. 11) that "[i]t is clear that the [Federal Communications] Commission is not a funding agency * * *."[9]

Petitioners' suggestion that *Grove City College* v. *Bell*, No. 82-792 (Feb. 28, 1984), overturned this conclusion is completely without foundation. In *Grove City*, the Court held that certain federal grants given to a college's students constituted federal financial assistance to the college's financial aid program within the meaning of Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a). The Court also held that Title IX prohibits sex discrimination in the program receiving the assistance but not in other aspects of the college's operations. *Grove City* had nothing to do with the FCC or with licenses of any sort, and we fail to see how it can support petitioner's argument here.[10]

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[9]There is also no merit to petitioners' suggestion (Pet. 19) that the FCC must issue regulations because, as amended in 1978, Section 504 applies not only to federally-funded programs but also to "any program or activity conducted by any Executive agency." 29 U.S.C. 794. As we noted in our brief in *Gottfried I*, Nos. 81-298 and 81-799 (at 8 n.7), "[the] programming of broadcasters licensed by the Commission is not a 'program or activity conducted by' the Commission itself" and is thus not affected by the 1978 amendment. See 124 Cong. Rec. 13901, 38551 (1978) (remarks of Rep. Jeffords, author of 1978 amendments).

[10]The court of appeals' decision reversing the judgment against the FCC is also supported by this Court's recent decision in *ITT World Communications* v. *FCC*, No. 83-371 (Apr. 30, 1984). The Court there noted (slip op. 11) that exclusive review of Commission orders lies in the court of appeals and that "[l]itigants may not evade this requirement by requesting the District Court to enjoin action that is the outcome of the agency's order." As we argued below (see our court of appeals brief at 59-63), the district court in this case lacked jurisdiction to entertain

b. Petitioners' claim that funding agencies are legally required to issue regulations construing Section 504 runs afoul of the basic principle of administrative law that agencies generally have the discretion to interpret their governing statutes by adjudication or by rulemaking. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. at 294; *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 765-766 (1969); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 201 (1947). Petitioners completely ignore this precept and instead rely on the fact that the federal respondents previously stated on various occasions that regulations or guidelines were being developed (see Pet. 10-14). Those statements were made in good faith and were correct when made. The responsible agencies subsequently decided, however, that Section 504's requirements in the field of television programming could be better defined through adjudication. Petitioners have cited no authority, and we are aware of none, holding that an agency is precluded from proceeding by adjudication if it initially expresses as intention to employ rulemaking.[11]

In addition, as the court of appeals recognized (Pet. App. 10), the development of standards by adjudication has a number of advantages in this context. It "permit[s] the Government to remain responsive to the developing technology in this area" (*ibid.*). And "[u]se of adjudication and contract conditions allows the Government to work with producers and broadcasters in developing programs that are accessible to hearing impaired viewers" (*ibid.*).

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petitioners' claims against the FCC, since those claims were previously considered and rejected in Commission orders. See *License Renewals — Los Angeles*, 69 F.C.C. 2d 451 (1978), 72 F.C.C. 2d 273 (1979), rev'd in part, aff'd in part, *Gottfried* v. *FCC*, 655 F.2d 297 (D.C. Cir. 1981), rev'd in part, *Community Television of Southern California* v. *Gottfried, supra;* see also *Equal Employment Opportunity Rules*, 76 F.C.C. 2d 86 (1980) (denying rulemaking petition), reconsid. denied, 80 F.C.C. 2d 299 (1980), aff'd, *California Ass'n of the Physically Handicapped* v. *FCC*, 721 F.2d 667 (9th Cir. 1983).

[11]Futhermore, as the court of appeals noted (Pet. App. 9), "the Government preserved its claims that it need not issue regulations at all stages of the proceedings [in district court]."

Petitioners argue (Pet. 14), however, that the agencies' failure to promulgate rules has resulted in the continuation of "a Catch-22 situation where broadcasters escape *ad hoc* consideration of discrimination against deaf people because there are no rules or standards by which to judge them." That charge is false, as is illustrated by the adjudication of an administrative complaint filed against KCET under Section 504 by one of petitioner's attorneys, Abraham Gottfried, Esq. The Department of Education rejected Mr. Gottfried's claim that KCET's programming discriminated against hearing impaired persons.[12] The Department concluded that KCET had complied with Section 504 by broadcasting federally subsidized programs containing closed captions in such a way that the captions could be received by viewers with decoders.

The adjudication of Mr. Gottfried's complaint against KCET shows that Section 504's requirements in the area at issue are being considered and decided by the responsible agencies. Petitioners' disagreement with the results of those adjudications provides no basis for requiring the agencies to proceed by rulemaking.

Finally, petitioners assert (Pet. i-ii) that this Court held in Gottfried I "that rulemaking is the best method of defining the duty of public broadcasters under the Rehabilitation Act * * *." See also Pet. 9-10. As the court of appeals observed (Pet. App. 10), however, this Court's decision "contains no suggestion that the Government must proceed by rulemaking."[13]

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[12]The Department of Education's decision was appended to KCET's brief (at 1a-7a) in *Gottfried I*.

[13]This Court did note (*Community Television of Southern California* v. *Gottfried*, slip op. 13 n.18) that it is preferable for changes in licensing policies to be made prospectively and that rulemaking is "generally a 'better, fairer, and more effective' method of implementing a new industry-wide policy than is the uneven application of conditions

2. Petitioners contend (Pet. 20) that the FCC is required by the Communications Act to issue regulations specifying the steps that broadcasters must take to make their programming understandable to hearing-impaired viewers. This argument is also invalid. As we explained at length in our brief in *Gottfried I* (at 3-7, 34-43), for more than a decade the Commission has attempted to encourage the development of technically and financially feasible means of making television accessible to the hearing impaired, but the Commission has concluded that, at present, technological and financial problems are such that it should generally rely on voluntary initiatives rather than mandatory requirements under the Communications Act. This Court has held that the Commission must be permitted "to implement its view of the public-interest standard of the Act 'so long as that view is based on consideration of permissible factors and is otherwise reasonable.' " *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) (quoting *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 (1978)). Under this standard, the Commission's well-considered approach to the issue of captioning must be sustained.

3. Finally, petitioners contend (Pet. 20-21) that they have been denied the benefits of public television in violation of the First and Fifth Amendments. As the court of appeals held, however, there is no authority that even remotely supports petitioners' ill-defined claims.

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in isolated *license renewal proceedings*." (*id.* at 13 (emphasis added)). These remarks dealt solely with licensing proceedings, where new interpretations can be particularly harsh. With respect to funding agencies, the Court stated merely that interpretive rules "may be promulgated" if the agency chooses (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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